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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950

No. 328

MARSHALL & HUSCHART MACHINERY CO., an Illinois corporation,

Petitioner,

vs.

DEPARTMENT OF REVENUE, STATE OF ILLINOIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED.

In respondent's view of this case, none of the questions as stated by petitioner are presented by this record.

In respondent's view, the questions presented are:

1. ILLINOIS' RETAILERS' OCCUPATION TAX ACT (Ill. Rev. Stats. 1959, Ch. 120, Pars. 440-453, Vol. 2, pp. 1388-1400) IMPOSES A TAX "UPON PERSONS ENGAGED IN THE BUSINESS OF SELLING TANGIBLE PERSONAL PROPERTY AT THE RATE OF 2½% OF THE GROSS RECEIPT

FROM SUCH SALES." THE TAX IS IMPOSED UPON RETAIL VENDORS WHO SELL THEIR OWN PROPERTY AND UPON PERSONS SUCH AS PETITIONER WHO, AS A REGULAR COURSE OF BUSINESS, SOLICIT ORDERS IN ILLINOIS FOR CONTRACTUAL ACCEPTANCE BY WHOLESALERS OUTSIDE OF ILLINOIS IF SUCH PERSONS REGULARLY PURCHASE FROM THE WHOLESALER THE ILLINOIS CUSTOMERS' ACCOUNTS RECEIVABLE AND COLLECT PAYMENT OF SUCH ACCOUNTS IN ILLINOIS. THIS PETITIONER DOES. DOES THE IMPOSITION OF THE TAX UPON PETITIONER VIOLATE THE COMMERCE CLAUSE (ARTICLE I, SECTION 8) OF THE FEDERAL CONSTITUTION?

2. DOES THE TAX IMPOSED UPON PETITIONER DEPRIVE PETITIONER OF DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT?

3. DOES THE TAX IMPOSED UPON PETITIONER DENY PETITIONER EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT?

STATEMENT OF THE CASE.

A concise statement of the undisputed facts concerning the conduct of petitioner's business held taxable by the Supreme Court of Illinois follows. All quotations in this Statement are from the language of the Supreme Court of Illinois, with page references to the Appendix to Petitioner's Brief and to the official report of the Supreme Court of Illinois (18 Ill. 2d 496).

Petitioner, "prior to 1946, bought machine tools from manufacturers and sold them to users in this State. In order to compete with out-of-State sellers, who were not subject to the Illinois retailers' occupation tax, the plaintiff [petitioner] revised its operation. It proposed to enter into amendments of its exclusive representation agreements held with its manufacturers, to become a limited agent only for these out-of-State manufacturers, with authority

only to solicit orders from Illinois customers and to forward same to the out-of-State manufacturers for acceptance at their places of business. The machines were then to be manufactured and shipped into Illinois directly to the customer f.o.b. the out-of-State factory. The out-of-State manufacturer, as principal, was then to send its invoices to plaintiff [petitioner] at the retail price, less the commission payable to plaintiff, and plaintiff was to invoice the customer at full list price." (*Petitioner's Appendix B*, p. 3a, 18 Ill. 2d 497.)

Respondent first ruled that the mode of conduct of petitioner's business as outlined above would not be subject to the tax. After the Department had reversed this ruling petitioner "amended its exclusive representation agreements, engaged in solicitation, etc., as proposed, *and purchased the accounts receivable of the out of State manufacturers thus generated, without recourse.*" (Emphasis supplied.) (*Petitioner's Appendix B*, p. 3a, 18 Ill. 2d 498.)

In short, petitioner's mode of doing business held taxable by the Supreme Court of Illinois consists, then, of the following regular course of procedure:

Petitioner solicits orders from Illinois customers for machinery to be manufactured by out-of-State manufacturers. Petitioner has no authority contractually to accept these orders but transmits them to the out-of-State manufacturer for acceptance. The out-of-State manufacturer ships the machines directly to the Illinois customer. When the orders are accepted, petitioner purchases the customers' accounts receivable from the manufacturer *without recourse* at the retail price, less the commission payable to the plaintiff. Petitioner effects collection of the accounts in Illinois.

The tax laid upon petitioner is measured by the gross receipts of petitioner's collections.

On these facts the Circuit Court of Cook County, Illinois, entered a judgment against petitioner in the sum of $178,256.32. (*Petitioner's Appendix E*, pp. 24a and 25a.) The Supreme Court of Illinois affirmed. (*Petitioner's Appendix B*, pp. 2a-7a, 18 Ill. 2d 496 at p. 502.)

ARGUMENT.

I.

Certiorari should be denied on the authority of Norton Company v. Department of Revenue, 340 U. S. 534, and Superior Oil Company v. State of Mississippi, 280 U. S. 390.

For the immediate convenience of the Court in considering this Argument, we repeat our summary of the mode of petitioner's business transactions that have been held taxable by the Supreme Court of Illinois:

Petitioner solicits in Illinois orders for machinery. The orders are accepted by out-of-State manufacturers and are filled by direct shipment from the manufacturer to the customer. Petitioner then purchases the Illinois customers' accounts receivable "without recourse" at the sales price less petitioner's commission. Petitioner collects in Illinois the amounts due from the Illinois customers.

In *Norton Co.* v. *Dept. of Revenue*, 340 U. S. 534, this Court sustained the imposition of the Illinois Retailers' Occupation Tax upon Norton Company with respect to interstate sales effected in the following manner:

Employees of Norton Company received in Illinois orders from Illinois customers. The Illinois employees did not contractually accept these orders but did return the Illinois customers' credit before transmitting the orders for con-

tractual acceptance to Norton Company's principal office in Massachusetts. The orders were filled in Massachusetts, the goods (abrasive machines and supplies) being shipped directly from Massachusetts to the Illinois customers.*

The *rationale* of this Court's decision is that although a tax may not be laid upon the mere solicitation of orders for contractual acceptance and filling outside the State of solicitation, where the vendor engages in other activity within the State other than mere solicitation of orders, the gross receipts resulting from orders solicited in the State may be made the measure of a tax without infringing the Commerce Clause if the taxpayer's course of conduct constitutes the "doing of business" within the State. It is of no moment that the sales that measure the tax are interstate sales. *Norton* v. *Department of Revenue*, 340 U. S. 534.

In this case, petitioner not only solicits orders from Illinois customers but in effect rates and guarantees their credit by purchasing their accounts receivable. In fact, petitioner pays these accounts absolutely by purchasing them without recourse.

Petitioner suggests that the out-of-State manufacturers, not petitioner, are the vendors in the transactions by which

*The Norton Company also involved other types of transactions that were here held taxable. Among such transactions were the following: Norton Company would receive at its Massachusetts office orders from Illinois customers, contractually accept such orders, and ship goods in fulfillment of the orders in carload lots commingling the goods of several customers. The Chicago employees would break the carload and reassign the separate orders in their original packages to Illinois customers.

The Court held not taxable orders received directly at and filled directly from Norton's Massachusetts main office, their being no intermediacy in the transactions by any Illinois employee of Norton Company.

Illinois seeks to measure the tax imposed. But the question as to who is a "vendor at retail" under the Illinois Retailers' Occupation Tax Act is a question of Illinois, not of Federal law. Where Illinois' answer to that question is not arbitrary, it is not subject to review in this Court.

Petitioner's business of soliciting orders, purchasing and collecting upon accounts receivable in Illinois is clearly so far an Illinois business as to support the incidence of the tax involved in this case.

As the Supreme Court of Illinois observed in its opinion in this case, "The mere amendment of the agreements of plaintiff [petitioner] and the out-of-State manufacturers, without an actual change of business operation, could not convert a purely local business into an interstate commerce business protected by the commerce clause." (*Petitioner's Appendix B*, p. 7a, 18 Ill. 2d 301.) That court cited *Superior Oil Co.* v. *State of Mississippi*, 280 U. S. 390, as declaring that it is "not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to State control, into an interstate business, protected by the Commerce Clause, *Brown* v. *Waycross*, 233 U. S. 16, 23."

Reply to Sundry Points Made By Petitioner

Petitioner's assertion that it "did not make the sales upon which Respondent insists on charging Petitioner" (*Petition*, p. 11) is untenable. Whether the soliciting of an order resulting in an acceptance and delivery, the guaranteeing of credit, the purchase of accounts receivable and collection of the purchase price constitutes the making of a "sale", within the purview of the Illinois Retailers' Occupation Tax Act is a question of State, not Federal law. The technical question as to who has legal title to the

goods sold and when that title passes is not of constitutional moment. The statutory concept of "sale" for taxing purposes may be permissibly different from the concept of "sale" in other contexts so long as the statutory concept is not arbitrary.

Similar considerations reply to petitioner's assertion that "the sale had been made" before petitioner purchased and collected the accounts receivable. For the purposes of the Illinois tax, no sale is complete and no tax is due until the purchase price, which is the measure of the tax, has been paid. If the customer never pays for the goods, no tax ever becomes due.

For tax purposes, the Supreme Court of Illinois constitutionally treated petitioner as a taxable vendor.

For these reasons, it is respectfully submitted that the incidence of Illinois' tax upon petitioner's transactions does not violate the Commerce Clause, does not deny petitioner due process of law and does not deny equal protection of the law.

CONCLUSION.

It is respectfully submitted that *certiorari* should be denied.

Respectfully submitted,

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